No. 14-1280

In the Supreme Court of the United States

JEFFREY J. HEFFERNAN, PETITIONER

v.

CITY OF PATERSON, NEW JERSEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment bars the government from demoting a public employee based on a supervisor's erroneous perception that the employee supports a political candidate.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the First Amendment bars a public employer from demoting an employee based on the mistaken perception that he had supported a particular candidate for office. The United States is the Nation's largest public employer, employing 2.7 million people who constitute approximately 12.6% of all federal, state, and local government employees. See U.S. Census Bureau, *Annual Survey of Public Employment & Payroll Summary Report: 2013*, at 2, 7 (Dec. 2014). The United States therefore has a substantial interest in the constitutional standards governing when a public employee may be disciplined based on the government's perception of his political affiliation. In addition, the United States is responsible for enforcing federal labor and employment statutes that prohibit employment discrimination and retaliation, including

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Similar mistake-of-fact situations may arise in cases brought under those statutes.

STATEMENT

1. In 2005, petitioner, a detective in the Paterson, New Jersey, Police Department, was assigned to work in the office of the Chief of Police, respondent James Wittig. Pet. App. 2a. In 2006, petitioner's bedridden mother asked him to obtain a lawn sign supporting Lawrence Spagnola, a former Paterson police chief who was running for mayor of Paterson against the incumbent, respondent Jose Torres. Because petitioner did not reside in Paterson, he was ineligible to vote in the election, and he was not involved in Spagnola's campaign. *Id.* at 2a-3a, 15a-16a.

Another Paterson police officer assigned to Mayor Torres's security staff observed petitioner speaking to Spagnola's campaign manager when petitioner visited a distribution point to obtain the sign. Pet. App. 3a, 15a-16a. That officer told Chief Wittig that petitioner "was out hanging political signs in the second ward." *Id.* at 16a (citation omitted). The next day, one of petitioner's supervisors confronted him about his interaction with Spagnola's staff. *Id.* at 16a-17a. Petitioner was then transferred out of Chief Wittig's office and "demoted to walking patrol" based on his "political involvement with Spagnola." *Id.* at 3a, 16a-17a. Wittig later testified that petitioner had "breached his trust" and violated office policy by being "overtly involved in the political campaign." *Id.* at 17a (citation omitted).

2. In 2006, petitioner filed this action under 42 U.S.C. 1983, alleging in relevant part that respondents (Mayor Torres, Chief Wittig, and the City of Paterson) violated his First Amendment rights by demoting him based on their erroneous belief that he supported Spagnola's mayoral campaign. Pet. App. 3a-4a.

a. In 2009, a jury found that respondents Torres and Wittig had infringed petitioner's freedom of association. Pet. App. 4a. After trial, however, the district judge recused himself based on a conflict of interest, vacated the jury's verdict, and transferred the case to a different judge. *Id.* at 4a, 18a-19a.

The district judge to whom the case was reassigned granted summary judgment for respondents. Pet. App. 66a-71a. The court ruled that petitioner's free-speech claim failed because petitioner had not engaged in any protected speech, but it did not address petitioner's free-association claim. *Id.* at 70a. Petitioner appealed, and the court of appeals reversed and remanded on procedural grounds. *Id.* at 57a-65a. The court held that the district court had erred by denying petitioner an opportunity to oppose respondents' motions for summary judgment, by refusing to consider evidence presented during the 2009 trial, and by failing to address petitioner's free-association claim. *Id.* at 59a-65a.

b. On remand, a third district judge granted summary judgment for respondents. Pet. App. 14a-54a. As relevant here, the court rejected petitioner's claim that respondents violated his First Amendment association rights by "demot[ing] him because they mistakenly believed that his actions betokened an affiliation with the Spagnola political organization." *Id.* at 45a. Canvassing the trial record, the court concluded

that in picking up the political sign for his mother, petitioner had not actually intended to engage in political activity or associate with Spagnola's campaign. *Id.* at 44a-45a. In the absence of "First Amendment conduct," the court reasoned, petitioner could not establish that respondents had retaliated on the basis of his engagement in protected activity. *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-13a. In relevant part, the court held that the district court had correctly rejected petitioner's "perceived-support" theory that respondents retaliated against him based on their mistaken belief that he was involved in Spagnola's campaign. *Id.* at 11a-13a. The court viewed that claim as foreclosed by Third Circuit precedent holding that "a free-speech retaliation claim is actionable under [Section] 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." *Id.* at 11a (citing *Ambrose* v. *Township of Robinson*, 303 F.3d 488, 496 (2002)). The court found "no convincing reason" to distinguish between the free-speech claim at issue in *Ambrose* and petitioner's free-association claim. *Ibid.* The court concluded that petitioner argued only that he was demoted "on a factually incorrect basis," rather than for any protected conduct, and that "it is not 'a violation of the Constitution for a government employer to [discipline] an employee based upon substantively incorrect information.'" *Id.* at 13a (brackets in original) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 679 (1994) (plurality opinion)).

SUMMARY OF ARGUMENT

A public employer violates the First Amendment when it takes action against an employee for associat-

ing with a disfavored political party, unless party affiliation is a reasonable requirement for the position in question. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 514-515 (1980). A public employer acts equally unconstitutionally when it acts against the employee based on the mistaken belief that he has engaged in disfavored political activity. The employer that is both politically motivated and willing to act on unsubstantiated, ultimately incorrect suspicions should not be given a free pass to act with the purpose of suppressing its employees' political beliefs.

I. The Court's decisions on government limitations on public employees' political activity establish that the touchstone of the First Amendment inquiry is the government's motive. A public employer has considerable discretion to enforce neutral restrictions on partisan activity that are designed to ensure efficiency, *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-566 (1973), and it likewise has leeway to impose a political-affiliation requirement when affiliation "is an appropriate requirement for the effective performance of the public office involved," *Branti*, 445 U.S. at 518. By contrast, when a public employer takes action against an employee for the purpose of suppressing his beliefs or association in the absence of those justifications, it violates that employee's right to freedom of association and, more broadly, chills all employees' exercise of their rights of association. *Id.* at 515-517.

Accordingly, a public employee may establish that his employer's action against him violated the First Amendment by "prov[ing] that [he was] discharged 'solely for the reason that [he was] not affiliated with or sponsored by the [government's chosen] [p]arty.'"

Branti, 445 U.S. at 517 (citation omitted). The employee need not show that the government's action was taken in response to any affirmative exercise of First Amendment rights, or that his rights of belief and association were actually chilled or coerced.

The employer's unconstitutional motive is no different when the employer acts on the basis of a mistaken perception of the employee's beliefs. "Motive and knowledge are separate concepts," *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015), and an employer's mistake of fact does not vitiate its purpose of suppressing disfavored beliefs. In the context of a mistake running the other way—where the employer mistakenly believed that an employee had made statements for which she could constitutionally be fired—the Court has held that the constitutionality of the employer's action should be judged based on the facts as it perceived them. See *Waters* v. *Churchill*, 511 U.S. 661 (1994). The same analysis should apply here.

There is no justification for treating a public employer's attempt to suppress disfavored beliefs and association differently when the employer happens to be wrong about the employee's beliefs. Whether or not the employer is factually mistaken, its action violates the employee's First Amendment right not to be penalized for the purpose of suppressing his beliefs. And the chilling effect on all employees is no less severe when the employer is mistaken.

The court of appeals' contrary view would lead to anomalous results. The employer that proceeds based on unsubstantiated doubts about an employee's political loyalty—and turns out to be wrong—would be free

to take action against employees for the purpose of suppressing political association. An employee's ability to challenge the employer's action would turn on happenstance—whether the employer's inferences about his beliefs are correct. And courts would have to engage in intrusive inquiries into the substance of plaintiffs' beliefs in order to determine whether their claims were meritorious.

II. Similar mistaken-perception issues arise in the context of federal statutes that protect public and private employees from discrimination and retaliation. Whether an employer may be liable under a particular statute for discriminating or retaliating based on a mistaken perception of the employee's status or actions turns on the proper construction of the statute in question. As a result, the Court's decision in this case will not resolve—and the Court should not seek to resolve—similar questions arising in the federal statutory context.

ARGUMENT

I. A PUBLIC EMPLOYER VIOLATES THE FIRST AMENDMENT WHEN, ABSENT JUSTIFICATION, IT ACTS AGAINST AN EMPLOYEE WITH THE PURPOSE OF SUPPRESSING DISFAVORED POLITICAL BELIEFS, EVEN IF THE EMPLOYER'S PERCEPTION OF THOSE BELIEFS IS MISTAKEN

"[E]ven though the government may deny" an individual public employment "for any number of reasons, there are some reasons upon which the government may not rely." *Branti* v. *Finkel*, 445 U.S. 507, 514-515 (1980) (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). In particular, a public employer generally violates the First Amendment when it takes action against an employee in order to suppress disfa-

vored political activity or enforce a "state-selected orthodoxy." *Rutan* v. *Republican Party*, 497 U.S. 62, 75 (1990); see *Elrod* v. *Burns*, 427 U.S. 347, 351 (1976) (plurality opinion). When a public employer acts with that impermissible motive, it violates the targeted employee's First Amendment right to be free from such coercion, and it chills the First Amendment activities of other public employees.

An employer who takes action against an employee for the purpose of suppressing political beliefs should not be absolved of liability under the First Amendment simply because it happens to be mistaken about the employee's political affiliation. That mistake of fact does not vitiate the employer's unconstitutional motive or the resulting chilling effect. The court of appeals' contrary decision should therefore be vacated and the case remanded for further proceedings.

A. The First Amendment Generally Prohibits A Public Employer From Acting Against An Employee With The Purpose Of Suppressing Disfavored Political Beliefs Or Association

1. A public employer may place neutral restrictions on all partisan activity but generally may not condition employment on political affiliation

a. The government has considerable leeway under the First Amendment to regulate its employees' partisan activity when it seeks to impose neutral limits that do not attempt "to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (*Letter Carriers*). The Hatch Political Activity Act (Hatch Act), 5 U.S.C. 7321 *et seq.*, which limits parti-

san activities by federal employees, is an example of such a neutral regulation.

The Court has twice upheld a prior provision of the Hatch Act that prohibited all federal employees from taking any active part in political management or in political campaigns. See *United Pub. Workers* v. *Mitchell*, 330 U.S. 75, 82-83 (1947); *Letter Carriers*, 413 U.S. at 564-567. The Court emphasized that the prohibition was "not aimed at particular parties, groups, or points of view," *Letter Carriers*, 413 U.S. at 564, but was instead designed to promote government efficiency and integrity. In particular, the Court observed, the provision was intended to ensure that "[g]overnment employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *Id.* at 566. Accordingly, the government generally may condition public employment on compliance with even-handed rules limiting partisan activity, so long as they reflect a reasonable balance between the government's efficiency interests and the employees' interests in participating in "matters of public concern." *Id.* at 564 (citation omitted); see *Mitchell*, 330 U.S. at 101.

b. A public employer also has leeway to make party affiliation a condition of public employment when a particular affiliation "is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. When "an employee's private political beliefs would interfere with the discharge of his public duties," as is the case with many policymaking jobs, "his First Amendment rights may be required to yield to the State's vital interest in

maintaining governmental effectiveness and efficiency." *Id.* at 517. In such cases, the government may condition employment on party affiliation because that condition "has some justification beyond dislike of the individual's political association." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S 712, 721 (1996).

Absent such a justification, however, the government generally may not "make public employment subject to the express condition of political beliefs or prescribed expression." *O'Hare*, 518 U.S at 717; *Rutan*, 497 U.S. at 71; *Branti*, 445 U.S. at 516; *Elrod*, 427 U.S. at 358-359. For instance, an incoming County Sheriff may not maintain a "practice" of replacing "employees of the Sheriff's Office with members of his own party when the existing employees lack or fail to obtain requisite support from" the new Sheriff's political party. *Elrod*, 427 U.S. at 351; see *Branti*, 445 U.S. at 510. And without the requisite justification, a state employer may not deny promotions and transfers because the employees "did not have the support of Republican Party officials." *Rutan*, 497 U.S. at 67.

This Court has concluded that such patronage practices offend the First Amendment because the government is acting with the purpose of "deny[ing] a benefit to a person because of his constitutionally protected speech or associations." *Branti*, 445 U.S. at 515 (citation omitted). "[C]onditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association.'" *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 359). The "knowledge that one must have a sponsor in the dominant party in order to retain one's job" necessarily inhibits employees—and potential employees—from expressing their own be-

liefs and supporting the political parties or causes of their choice. *Branti*, 445 U.S. at 516; see *Elrod*, 427 U.S. at 356 (noting that patronage practices "deter[]" both "[e]xisting employees" and "the multitude seeking jobs" from supporting "competing political interests"); *Rutan*, 497 U.S. at 72. Employees will also feel pressure to "compromise" their "true beliefs" by professing to support the employer's chosen party or position. *Elrod*, 427 U.S. at 355.

2. The Court's partisan-affiliation decisions establish that the government violates the First Amendment when it acts against an employee with the purpose of suppressing belief and association

The touchstone of the First Amendment inquiry in the *Elrod* line of cases is the government's motive. When the government acts with the purpose of suppressing disfavored political association, absent the justifications discussed above, it violates the First Amendment. Accordingly, "[t]o prevail in this type of an action, it [i]s sufficient" for the plaintiff "to prove that [he was] discharged 'solely for the reason that [he was] not affiliated with or sponsored by the [favored] [p]arty.'" *Branti*, 445 U.S. at 517 (citation omitted). That characterization of the elements of an *Elrod* claim establishes that a public employee's right to freedom of association is violated when his employer acts against him with the purpose of suppressing his beliefs or association. No more is required.

Two aspects of the Court's decisions underscore that conclusion. First, the Court has approved *Elrod* claims that are not premised on any affirmative exercise of First Amendment rights. The Court has emphasized that a public employer acts with the requisite improper motive when it takes action against an em-

ployee because he *lacks* the support or sponsorship of a particular party. See *Branti*, 445 U.S. at 516; *Elrod*, 427 U.S. at 351 (government violates First Amendment when it dismisses employees because they "lack or fail to obtain requisite support from" the favored party). There could be any number of reasons an employee lacks the support of the favored party. He might have affirmatively affiliated himself with an opposing party, or he might have affirmatively refused to seek the support of the favored party. Or his lack of in-party support might be the result of political apathy rather than any intentional exercise of First Amendment rights. The Court has not distinguished among such plaintiffs. See *Rutan*, 497 U.S. at 67 (observing that some of the plaintiffs alleged that they were denied benefits because they "did not have the support of the local Republican Party," without inquiring into the reasons for the lack of support).

Nor would such distinctions be justified: surely an incoming mayor's preemptive firing of all employees who did not support his campaign is no less wrongful with respect to those employees who were simply politically inactive. And even when an employee has not affirmatively exercised any First Amendment right before being fired for his lack of political support, the chilling effect on other employees "necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." *Branti*, 445 U.S. at 516.

Second, the employee also need not show that but for the unconstitutional condition imposed by the employer, he *would have* exercised his First Amendment rights. There is "no requirement that dismissed employees prove that they, or other employees, have

been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U.S. at 517. In other words, the plaintiff need not demonstrate that he was chilled in his beliefs or association. Indeed, the Court has acknowledged that for some public employees, the threat of losing one's job might be "ineffective to coerce them to abandon political activities," but it has declined to engage in any case-by-case inquiry into chilling effect. *O'Hare*, 518 U.S. at 723. The Court explained that questions about the precise degree of chill suffered by a particular plaintiff are irrelevant in light of "a more fundamental concern": "public employees[] are entitled to protest wrongful government interference with their rights of speech and association." *Ibid.*; see *Rutan*, 497 U.S. at 69 ("conditioning public employment on the provision of support for the favored political party 'unquestionably inhibits protected belief and association'") (quoting *Elrod*, 427 U.S. at 359). That interference occurs when the government takes action against the employee for the purpose of suppressing belief and association. See *Branti*, 445 U.S. at 517.

B. When A Public Employer Acts On The Basis Of An Employee's Perceived Political Association, It Should Not Be Absolved Of Potential Liability Simply Because Its Perception Was Inaccurate

The question presented in this case is whether, when the government acts against an employee on the basis of his perceived political association, the fact that the employee did not actually engage in associational activities should prevent the employee from challenging that action. *Elrod* and its progeny do not directly address that issue. The reasoning of those decisions indicates, however, that when an employer

acts with the unconstitutional purpose of suppressing disfavored political beliefs, its mistake of fact should not absolve it of liability. The government's motive—the crux of an *Elrod* claim—is no different when it is based on a factual error about the nature of the employee's beliefs. Nor does a mistake alter the employee's injury: just like the employees in *Elrod*, *Branti*, and *Rutan*, he has been subjected to an adverse action for an unconstitutional reason. See *Rutan*, 497 U.S. at 72 ("[T]here are some reasons upon which the government may not rely.") (emphasis and citations omitted). Knowledge of the government's purpose, moreover, will create precisely the chilling effect on all employees that the *Elrod* doctrine is designed to prevent.

1. The government's purpose of suppressing political affiliation is the same whether or not that purpose is premised on a mistake of fact

a. *Elrod* and its progeny hold that the government violates the First Amendment when it acts against an employee for the purpose of suppressing political beliefs and association. The government necessarily forms its purpose on the basis of a predicate factual conclusion about the nature of the employee's beliefs. That factual premise may or may not be mistaken. Either way, the government's ultimate purpose remains the same: to enforce political orthodoxy.[1]

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[1] The Court suggested as much in *Branti*. There, the Court treated the government's perception of the employee's affiliation as controlling: although the employee had registered as a Democrat, the Court viewed that fact as inconsequential because, for purposes of the government's practice of dismissing Republicans, "the parties had regarded [the employee] as a Republican at all relevant times." 445 U.S. at 509 n.4.

As this Court has recognized in the context of employment-discrimination claims, "[m]otive and knowledge are separate concepts." *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (*Abercrombie*). An employer can act with a particular motive regardless of the precise state of its knowledge with respect to the underlying facts that motivate its actions. *Ibid.* ("[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."). Whether an employer acts on the basis of actual knowledge or simply an "unsubstantiated suspicion" that turns out to be wrong, its motive is the same.

b. The constitutionality of the employer's motive therefore should be evaluated based on the facts as the employer believed them to be. The Court has used that approach when the employer's mistake runs the other way—*i.e.*, when the employer reasonably believes, in good faith, that the employee has engaged in activity for which she may permissibly be fired. In *Waters* v. *Churchill*, 511 U.S. 661 (1994) (plurality opinion), the Court held that when an employer fires an employee for her speech based on a mistaken perception of what she said, the constitutionality of the employer's motive should be judged based on the employer's perception. *Id.* at 681. There, the employer erroneously believed the employee had criticized her supervisor in an unprofessional manner, thereby speaking on matters of private concern that constitutionally may serve as the basis for dismissal. *Id.* at 665; see *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (employee speech on matters of private concern is not

protected by the First Amendment in the context of public employment). The employee claimed, however, that she had been speaking about the effect of the hospital's staffing policies on patient care, a matter of public concern for which the hospital could fire her only if its interest in efficiency outweighed the employee's interest in speaking. *Waters*, 511 U.S. at 665, 668; see *Connick*, 461 U.S. at 142.

Seven Justices agreed that the constitutionality of the dismissal should be judged based on the employer's perception of the content of the employee's speech—the statements the employer "thought she may have made"—even if that perception was incorrect.[2] *Waters*, 511 U.S. at 682; see *ibid.* (Souter, J., concurring); *id.* at 692 (Scalia, J., concurring in the judgment). Thus, although the employee had a "right not to be dismissed * * * in retaliation for her expression of views on a matter of public concern," that "right was not violated" where the employer misperceived the speech as private in nature, "since she was dismissed for another reason, erroneous though it may have been." *Id.* at 692 (Scalia, J., concurring in the judgment).

That reasoning should apply regardless of the nature of the employer's mistake. An employer who mistakenly believes facts that, if true, cannot constitutionally be the basis for adverse action, and who proceeds against the employee, has acted with an uncon-

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[2] The three Justices who concurred in the judgment disagreed with the plurality about the extent to which an employer must investigate before concluding that an employee has made statements for which she can be fired. They agreed, however, that the employer's perception of the speech should be used to perform the *Connick* analysis. *Waters*, 511 U.S. at 686, 692.

stitutional purpose. An employer who fires an employee for having a particular affiliation is attempting to "requir[e] that [the employee's] private beliefs conform to those of the hiring authority," *Branti*, 445 U.S. at 516—even if the employer turns out to be wrong about the employee's affiliation. It is, in short, a two-way street. An employer's conduct is evaluated in light of the facts as the employer perceives them to be, and that is so whether (as in *Waters*) that helps the employer or whether (as here) it does not.

2. A public employer who takes action against an employee based on a mistaken perception of his political affiliation violates that employee's First Amendment rights

a. The *Elrod* line of cases holds that a public employer violates an employee's First Amendment rights when it takes action against him in order to suppress disfavored beliefs. The government's motive of "inhibit[ing] belief and association through the conditioning of public employment on political faith" renders its action against the employee a violation of the employee's rights to freedom of belief and association. *Elrod*, 427 U.S. at 357. That is so whether or not the government actually succeeds in inhibiting association, and whether or not it acts in response to a particular act of association or expression of belief—the government's motive is the sole determinative consideration. See pp. 11-13, *supra*; *Branti*, 445 U.S. at 517 (to "prevail" an employee need only show that he was penalized "solely for the reason" of his beliefs) (citation omitted).

Because the government acts for the same purpose whether or not it is correct about the employee's affiliation or beliefs, it does not matter whether the em-

ployee actually associated with the disfavored party or actually engaged in any First Amendment activity at all. Either way, the employee's right to freedom of association has been violated, because the employee has been subjected to an adverse employment action for the purpose of suppressing his beliefs. That is a "reason[] upon which the government may not rely." *Branti*, 445 U.S. at 514-515 (citation omitted).

b. Respondents contend, however (Br. in Opp. 27), that "an employee cannot recover * * * on the theory that he was retaliated against for exercising a First Amendment right if he did not in fact exercise a First Amendment right." See also Pet. App. 13a. That argument misconceives the nature of the right this Court has recognized against government action taken on the basis of the employee's political beliefs. The Court's decisions make clear that the government does not violate the First Amendment only when it acts in response to particular expression or action that the First Amendment protects: rather, an employer acts unconstitutionally whenever it preemptively acts against employees for *failing* to obtain in-party support—whether that failure reflects an exercise of the employee's First Amendment right not to associate or simple apathy. *Rutan*, 497 U.S. at 66-67; *Elrod*, 427 U.S. at 351; see pp. 11-12, *supra*. That is because the *Elrod* line of cases protects "employees' *freedom* to believe and associate, or to not believe and not associate." *Rutan*, 497 U.S. at 76 (emphasis added). That freedom of belief is inhibited whenever the government "wield[s] its power" for the purpose of suppressing First Amendment activity, regardless of whether

the targeted employee actually engaged in that activity.[3] *Ibid.*

Respondents, like the court of appeals, also argue that the thrust of petitioner's claim is that respondents "demoted him on a factually incorrect basis." Pet. App. 13a; see Br. in Opp. 27 n.4. That claim does not state a First Amendment violation, respondents contend, because the *Waters* plurality stated that "[w]e have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." 511 U.S. at 679. But the *Waters* plurality was simply making the point—expressed in the immediately following sentence—that when an employer has followed "adequate procedure[s]," the employee's due process rights are not violated purely because the employer's information was incorrect. *Ibid.*; see *id.* at 695-696 (Stevens, J., dissenting) (arguing that due process does require the employer to act on correct information).

That statement of due-process standards is doubly inapplicable here. Petitioner's claim is not that his demotion violated the First Amendment *because* the information on which respondents acted was incorrect; rather, his claim is that respondents acted for a pur-

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[3] Respondents also rely (Br. in Opp. 29-31) on the Court's statement in *Perry* that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597. That statement does not purport to resolve the question presented here. The Court had no occasion to consider whether a public employer acts "because of [an employee's] constitutionally protected speech or associations," *ibid.*, when it mistakenly believes the employee engaged in such activities.

pose forbidden by the First Amendment, albeit based on information that turned out to be wrong. Cf. *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 606 (2008) (while an at-will employee may constitutionally be dismissed based on "substantively incorrect information," she may not be dismissed when doing so "would independently violate the Constitution") (citation omitted). *Waters* does not suggest that when an employer's information is incorrect, it may act in ways that would be unconstitutional if its information were accurate. If anything, *Waters*' recognition that the constitutionality of the employers' action should be judged based on the facts as the employer perceived them to be suggests the opposite. See pp. 15-17, *supra*.

3. Perceived-affiliation dismissals chill all public employees' exercise of their association rights

The prohibition on "conditioning employment on political activity" is founded on the recognition that such conditions "unquestionably inhibit[] protected belief and association" of all public employees. *Rutan*, 497 U.S. at 69, 75-76 (citation omitted); *Branti*, 445 U.S. at 513-516. The chilling effect caused by the employer's enforcement against any particular employee is no less severe when the employer turns out to be wrong about the facts that formed the basis for its decision. Whether the employer is right or wrong, the message to other employees is clear: their job is subject to their employer's perception that they maintain the "correct" political affiliation. The coercion that results from employees' "knowledge that one must have a sponsor in the dominant party" is not diminished simply because the government applies

that policy without regard to employees' actual beliefs. *Branti*, 445 U.S. at 516.

Indeed, employees' politically associative activity would be *more* severely inhibited if public employers were absolved of liability when their perceptions are incorrect. An individual's personal political beliefs are often the subject of inferences that others draw based on the person's actions—including actions not intended to express any particular belief. Characteristics such as what current events a person follows, what publications he reads, what charitable organizations he joins, and even how he dresses all could serve as the basis for inferences about the person's political leanings. If a public employer could take action against employees based on mistaken inferences about the employees' beliefs, that knowledge would chill not only employees' actual association, but also conduct that could be *mis*perceived as reflecting a political persuasion. Employees would have to think twice before joining a friend at a campaign event simply to learn more about a candidate—or, for that matter, before subscribing to the *New York Times* or the *Wall Street Journal*.

The potential chilling effect on public employees militates strongly in favor of prohibiting employers from taking action against employees based on their mistaken perceptions of the employees' beliefs. The Court has emphasized that an employee's right against political-affiliation dismissals must be broad enough effectively to prevent the chilling effect that such dismissals inflict on all employees. See *Branti*, 445 U.S. at 516 (holding that a dismissed employee need not show that his personal exercise of beliefs was chilled because such a rule would "emasculate" the

protection of *Elrod* by failing to fully "eliminate the coercion of belief" with respect to other employees). That same concern is present here: because a perceived-affiliation dismissal is just as chilling as a dismissal based on an employee's actual affiliation, it is necessary to prohibit both in order to effectively guard against the inhibiting effects on public employees' beliefs and associations.[4]

4. The court of appeals' contrary view would lead to anomalous results

Under the court of appeals' view, an employee's protection against being subject to adverse action "solely because of his private political beliefs," *Branti*, 445 U.S. at 517, would turn on whether the employer's perception of his affiliation happens to be right. That regime would lead to a number of arbitrary and unjustified results.

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[4] The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, which creates a comprehensive "framework for evaluating adverse personnel actions against federal employees," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (brackets and citation omitted), contains provisions relevant to political-affiliation discrimination against federal employees. The CSRA prohibits "any personnel action" that "discriminate[s]" against an employee "based on * * * political affiliation." 5 U.S.C. 2302(b)(1)(E). The Merit Systems Protection Board (MSPB), which adjudicates employee appeals of certain serious personnel actions, see, *e.g.*, 5 U.S.C. 4303(e), 7701(a), has occasionally considered claims that a personnel action violated Section 2302(b)(1)(E) because it was based on the employee's perceived political affiliation, but it has not squarely addressed whether Section 2302(b)(1)(E) prohibits perceived-affiliation discrimination. See, *e.g.*, *Heelen* v. *Department of Commerce*, 75 M.S.P.R. 366, 367-370 (1997), rev'd on other grounds, 154 F.3d 1306 (Fed. Cir. 1998).

a. The court of appeals' rule would treat employees who have engaged in similar conduct differently based solely on the accuracy of the employer's suspicions. Imagine two employees, each of whom receives in his office mail an invitation to a lecture sponsored by the American Constitution Society. Both leave the invitation on their desks. One is a member who supports the Society and progressive causes, and intends to attend the lecture; the other is not a member and simply forgot to throw the invitation away. Both are dismissed because the employer assumes that they must be members of the Society and therefore supporters of the Democratic Party. Under respondents' position, the first employee would be able to assert that his First Amendment rights were violated, but the second would not.

That makes little sense. In each case, the employer has acted with the intent to suppress the employees' beliefs. In each case, the employer has scrutinized the employee's actions and possible beliefs in service of a practice of enforcing political orthodoxy. Both employees have been dismissed for an invalid reason, and both dismissals will contribute to a chilling effect on other employees' exercise of their rights of belief and association. Indeed, the mistaken dismissal will likely enhance the chilling effect of the employer's policy, as employees will feel that they have to avoid any conduct that could be misperceived as association with the disfavored party. See p. 21, *supra*.

b. The court of appeals' regime would also treat public-employer mistakes differently depending on whether the mistake is favorable to the employer. As explained above, when the employer's reasonable mistake of fact leads it to act with the intent to penal-

ize unprotected activity, it will not be liable, even if the employee actually engaged in protected activity. See *Waters*, 511 U.S. at 681. That rule reflects the fact that when the employer acts with a legitimate motive (even if based on mistaken factual premises), its action does not violate the employee's First Amendment rights and is unlikely to chill the protected activities of other employees. See *id.* at 692 (Scalia, J., concurring in the judgment). Respondents would absolve the employer, however, whenever its mistake leads it to act for an unconstitutional motive—even though that purpose inflicts the precise harms with which *Elrod* is concerned.

Indeed, under the court of appeals' view, the employer treated most favorably is the one that is both politically motivated and willing to act on unsubstantiated suspicions. This Court has sharply limited the areas in which a public employer can act to suppress an employee's beliefs or associations. See *Branti*, 445 U.S. at 517. When an employer acts with that intent, it should not receive a free pass when it happens to be wrong about the facts. Otherwise, an employer would have incentive to act preemptively—for instance, immediately upon taking office—on the basis of untested doubts about employees' loyalty, before employees have had a chance to engage in any affirmative exercise of First Amendment rights.

c. Finally, if a public employer's accuracy about the targeted employee's beliefs determined its liability, courts would have to inquire into the substance of the employee's beliefs. *Elrod*, however, holds that "the raw test of political affiliation suffice[s] to show a constitutional violation, without the necessity of an inquiry more detailed than asking whether the re-

quirement was appropriate for the employment in question." *O'Hare*, 518 U.S. at 719. That "confin[ed]" inquiry reflects the recognition that "one's beliefs and allegiances ought not to be subject to probing or testing by the government." *Ibid.*

If the accuracy of the employer's perception of the employee's beliefs is determinative, the factfinder will have to engage in precisely the probing of beliefs that *Elrod* is designed to prevent. Plaintiffs would be motivated to assert that they in fact hold the beliefs ascribed to them, while employers may defend on the ground that they were mistaken about the plaintiffs' beliefs. The factfinder will have to resolve the resulting disputes about the content of the plaintiff's beliefs or the extent of his association. There is no reason to adopt an understanding of the First Amendment that would routinely lead to the sort of intrusive inquiries that the Amendment seeks to prevent. Cf. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) ("It is well established * * * that courts should refrain from trolling through a person's or institution's religious beliefs.").[5]

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[5] Conversely, permitting perceived-affiliation claims like petitioner's is unlikely to encourage plaintiffs to file frivolous suits. It is true that if the accuracy of the employer's perception is irrelevant, the plaintiff need not prove that he actually held the beliefs ascribed to him. But that will not materially diminish the courts' ability to dismiss meritless claims. The primary hurdle for a plaintiff asserting an *Elrod* claim (whether based on perceived or actual affiliation) is establishing that the employer's perception of the employee's beliefs was in fact the cause of the adverse employment action. Plaintiffs who fail to allege facts supporting a plausible inference that the employer acted for that impermissible purpose will not survive a motion to dismiss or a motion for summary judgment. See, *e.g.*, *Pashayev* v. *MSPB*, 544 Fed. Appx.

C. This Court Should Vacate And Remand To Permit The Parties To Litigate Petitioner's Claim, Including The Basis On Which He Was Demoted

As this case comes to the Court, it presents the question whether petitioner's claim that he was demoted for his political affiliation is foreclosed because respondents' perception of petitioner's affiliation was incorrect. See Pet. i; Pet. Br. 12. Before the court of appeals, both parties treated petitioner's claim as asserting that he was demoted in violation of *Elrod*; the dispute centered on whether the inaccuracy of respondents' perception foreclosed that claim. See Pet. C.A. Br. 32 (citing *Elrod*, 427 U.S. at 359); J.A. 16 (Compl. ¶ 28); Resp. C.A. Br. 26 (characterizing petitioner's claim as one brought under *Elrod*, and asserting that such a claim requires the plaintiff to demonstrate that he maintained a political affiliation). The court resolved that dispute in respondents' favor, holding that respondents were entitled to summary judgment on petitioner's "perceived-support" claim because petitioner had not actually engaged in any

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1006, 1010 (Fed. Cir. 2013) (per curiam) (affirming MSPB's conclusion that employee "failed to satisfy the burden of making a nonfrivolous allegation" that he was dismissed because of the perception that he was a Communist). As discussed below, moreover, courts have permitted mistaken-perception claims under various federal anti-discrimination and retaliation statutes. See Part II, *infra*. There is no reason to think that those decisions have spurred an increase in meritless claims. See, *e.g.*, *Nathaniel* v. *Mississippi Dep't of Wildlife, Fisheries & Parks*, No. 07-cv-549, 2010 WL 2106953, at *5-*6 (S.D. Miss. May 25, 2010) (dismissing Title VII mistaken-perception retaliation claim for insufficient evidence), aff'd, 411 Fed. Appx. 687 (5th Cir. 2010) (per curiam); *Boyer* v. *Pilot Travel Ctrs., LLC*, No. 05-cv-978, 2007 WL 708599, at *6 (W.D. Tex. Mar. 7, 2007).

"protected activity under the First Amendment." Pet. App. 13a. For the reasons stated above, that conclusion was erroneous. The case therefore should be remanded to permit the lower courts to adjudicate petitioner's perceived-affiliation claim.

On remand, the lower courts may need to resolve a factual dispute concerning the actual motive for petitioner's demotion. Before the district court, respondents at times asserted that petitioner was demoted not because of his perceived partisan affiliation, but instead because of his perceived violation of an unwritten policy prohibiting officers in the Chief's Office from engaging in *any* partisan political activities. See 06-cv-3882 Docket entry No. 189-1, at 38 (Mar. 8, 2013) (Resp. Mem. of Law in Supp. of Summ. J.) (asserting need for additional discovery concerning any department policy forbidding partisan activities). The factual record before the courts contains conflicting evidence with respect to respondents' motive. Compare, *e.g.*, C.A. App. A219-A221 (Chief Wittig testified that "I don't need personnel working in my office that give the appearance that we are overtly supporting or endorsing any political candidate, regardless of who that political candidate is"); *id.* at A633-A634, with *id.* at A215, A237, A301 (officer testimony disputing the existence of such a policy); *id.* at A363-A364 (testimony concerning "ramifications" for supporting Spagnola). The lower courts do not appear to have resolved that factual dispute. See, *e.g.*, Pet. App. 3a (citing testimony that petitioner was demoted because of his "overt[] involvement in a political election") (brackets in original); *id.* at 38a (noting evidence that supervisors told petitioner that "he was being transferred

because of his political affiliation") (internal quotation marks omitted).

If the lower courts conclude on remand that petitioner was demoted pursuant to a neutral policy forbidding all partisan activity, petitioner's First Amendment challenge would not be governed by *Elrod*. Instead, the validity of a neutral policy prohibiting all partisan activities would be governed by the standards set forth in *Letter Carriers*.[6] See 413 U.S. at 564; pp. 8-9, *supra*. The Court need not address those issues here, however, as the parties and the lower courts have to this point focused on whether petitioner could assert a claim that he was demoted in violation of *Elrod* despite the fact that he did not engage in the political association his supervisors perceived.

II. MISTAKEN-PERCEPTION ISSUES OFTEN ARISE IN THE CONTEXT OF CLAIMS BROUGHT UNDER FEDERAL DISCRIMINATION AND RETALIATION STATUTES, WHERE THE VIABILITY OF THE CLAIM DEPENDS ON THE PROPER CONSTRUCTION OF THE STATUTE IN QUESTION

The question whether an employee may challenge an adverse employment action taken because of the employer's mistaken perception also arises in the context of federal statutes prohibiting both public and private employees from discrimination and retaliation.[7] Whether an employee may assert a claim under

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[6] A neutral prohibition on partisan activities may also be subject to challenge on overbreadth or vagueness grounds. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 606-608, 616-618 (1973).

[7] Numerous statutes prohibit employment discrimination on the basis of various criteria, such as race, national origin, sex, religion,

those statutes based on an employer's mistaken perception that the employee was a member of a protected class, or engaged in a protected activity, turns on the proper construction of the applicable statute. As a result, the Court's decision in this case will not resolve—and this Court should not seek to resolve—similar questions arising in the federal statutory context. Cf. *Waters*, 511 U.S. at 674 (observing that statutory protections may extend "beyond what is mandated by the First Amendment").

The language of the relevant statutory provisions varies. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is perhaps the most explicit, as it prohibits discrimination against anyone who has, or is "*regarded* as having," certain disabilities. 42 U.S.C. 12102(1)(C) (emphasis added); see 42 U.S.C. 12112(a). This Court has accordingly held that "a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person[]" has a disability. *Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516, 521-522 (1999).

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age, disability, and military service. See, *e.g.*, Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, 2000e-2; Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12112; Uniformed Services Employment and Reemployment Rights Act of 1964 (USERRA), 38 U.S.C. 4311(a). These and other statutes also prohibit retaliation against employees who engage in statutorily protected activities, such as filing a charge of discrimination or exposing fraud. See, *e.g.*, ADA, 42 U.S.C. 12203(a); ADEA, 29 U.S.C. 623(d); FLSA, 29 U.S.C. 215(a)(3); National Labor Relations Act, 29 U.S.C. 158(a)(3) and (4); Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1); USERRA, 38 U.S.C. 4311(b).

Title VII, by contrast, does not employ any comparable language; instead, it prohibits discrimination against any individual "*because* of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). The Equal Employment Opportunity Commission (EEOC) has construed that provision to prohibit "[d]iscrimination against an individual based on a perception of his or her race * * * even if that perception is wrong." EEOC, *Directives Transmittal—Compliance Manual, Section 15: Race and Color Discrimination, No. 915.003*, Pt. 15-II, at 15-5 (2006); see 45 Fed. Reg. 85,633 (Dec. 29, 1980) (discrimination can be based on perception of characteristics associated with national origin, even if the employer does not know the plaintiff's "*particular* national origin group"). Courts of appeals have similarly held that an employer may be held liable for discriminating "because of" race or national origin even if the employer was mistaken about, or unaware of, the plaintiff's true race or origin. See, *e.g.*, *Jones* v. *UPS Ground Freight*, 683 F.3d 1283, 1299-1300 (11th Cir. 2012); see also *EEOC* v. *WC&M Enters., Inc.*, 496 F.3d 393, 401 (5th Cir. 2007).[8]

With respect to anti-retaliation provisions, courts of appeals have held that an employer violates provisions forbidding retaliation "because" the employee has engaged in a protected activity when it acts on the mistaken belief that the employee engaged in that

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[8] Some district courts, however, have held that persons who are perceived to fall into a protected class, but do not in fact do so, cannot pursue a Title VII claim. See, *e.g.*, *Lewis* v. *North Gen. Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (citing cases) (explaining that Congress could have specified that Title VII reached "'perceived religion' discrimination," but "[i]t did not").

activity. See, *e.g.*, *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3d Cir.) (the anti-retaliation provisions of the ADA, 42 U.S.C. 12203(a), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(d), "focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct"), cert. denied, 537 U.S. 824 (2002); *Saffels* v. *Rice*, 40 F.3d 1546, 1548-1550 (8th Cir. 1994) (The FLSA's prohibition on retaliation "because such employee has filed any complaint," 29 U.S.C. 215(a)(3) (emphasis omitted), applies when the employer wrongly believes the employee has filed a complaint.); *Brock* v. *Richardson*, 812 F.2d 121, 124-125 (3d Cir. 1987) (same); but cf. *McKinney* v. *Bolivar Med. Ctr.*, 341 Fed. Appx. 80, 83 (5th Cir. 2009) (per curiam) (observing that "the Fifth Circuit has not adopted this perception theory of retaliation").

Those decisions rest on some of the same considerations that support holding a public employer liable for action based on the mistaken perception that the employee has engaged in disfavored First Amendment activity For instance, the courts have recognized that an employer can act with a prohibited motive even if its understanding of the facts is incorrect. See *Fogleman*, 283 F.3d at 571; cf. *Abercrombie*, 135 S. Ct. at 2033 ("[T]he intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts."). They have also reasoned that the chilling effect of a retaliatory discharge is no less severe when the employer is wrong about the employee's having engaged in protected activity. *Brock*, 812

F.2d at 125 ("discharge of an employee in the mistaken belief that the employee has engaged in protected activity creates the same atmosphere of intimidation as does the discharge of an employee who did in fact complain of FLSA violations"). Ultimately, however, the question whether a given statute prohibits adverse employment actions based on a mistaken belief about an employee's status or activities will turn on the proper construction of the statute in question.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted.

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